STATE OF MICHIGAN

COURT OF APPEALS

FOREST HILL ENERGY-FOWLER FARMS, L.L.C., Plaintiff-Appellee,	UNPUBLISHED December 4, 2014
v	No. 319134 Clinton Circuit Court
TOWNSHIP OF BENGAL, TOWNSHIP OF DALLAS, and TOWNSHIP OF ESSEX, Defendants-Appellants.	LC No. 13-011152-CK

Before: RONAYNE KRAUSE, P.J., and WILDER and STEPHENS, JJ.

PER CURIAM.

Plaintiff obtained a special land use zoning permit from Clinton County that allowed it to operate a wind energy system. While plaintiff's application for a special use permit was pending, each defendant township adopted an ordinance imposing more restrictive requirements for wind energy systems, which they contended were enacted pursuant to their general police powers, not as a zoning regulation. Plaintiff filed this declaratory judgment action requesting the trial court to declare defendants' ordinances invalid and unenforceable.[1] The trial court granted plaintiff's motion for summary disposition under MCR 2.116(C)(10), ruling that defendants' ordinances were in substance zoning regulations that were unenforceable because they were not enacted under the Michigan Zoning Enforcement Act (MZEA), MCL 125.3101 *et seq.*, and conflicted with the county's ordinance, which had been enacted under the MZEA. Defendants appeal as of right. We affirm.

I. BACKGROUND

Plaintiff develops, owns, and operates a wind energy system in Clinton County, Michigan. Plaintiff began leasing land from several landowners in the county. In April 2010, the county passed a wind energy ordinance, which it later amended. Plaintiff applied for a

[1] Plaintiff also asserted a claim for violation of its right to substantive due process. The trial court determined that it was unnecessary to reach the merits of that claim, which is not at issue on appeal.

permit from the county in accordance with the ordinance. In January 2013, the county issued plaintiff a special land use zoning permit that allowed it to operate a wind energy system in the county. While plaintiff's application for a permit was pending, defendants Bengal Township, Dallas Township, and Essex Township each enacted a wind energy ordinance that effectively prevented plaintiff from developing its wind farm pursuant to the county's ordinance. For instance, Bengal Township's ordinance imposed new height, setback, noise, and shadow flicker[2] requirements that plaintiff admitted were impossible to meet. Plaintiff alleged that the ordinances effectively prohibited wind turbines in the townships. Plaintiff filed this action requesting the trial court to determine that defendants' ordinances were invalid and preempted by the county's ordinance.

II. RIPENESS

Initially, we address defendants' argument that plaintiff's claims were not ripe for judicial review because plaintiff did not attempt to obtain a license under any of defendants' ordinances or request a variance from the licensing requirements before filing this action. A trial court's decision whether a plaintiff has sufficiently alleged an actual controversy to properly invoke the trial court's jurisdiction to grant declaratory relief is reviewed de novo as a question of law. *Kircher v City of Ypsilanti*, 269 Mich App 224, 226-227; 712 NW2d 738 (2005).

Plaintiff filed this action for declaratory relief under MCR 2.605, which provides:

> **(A) Power to Enter Declaratory Judgment.**
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> (1) In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted.
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> (2) For the purpose of this rule, an action is considered within the jurisdiction of a court if the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than a declaratory judgment.
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> * * *
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> **(C) Other Adequate Remedy.** The existence of another adequate remedy does not preclude a judgment for declaratory relief in an appropriate case.

Under MCR 2.605, claims that involve an actual controversy need not also involve an actual injury. As this Court explained in *Kircher*, 269 Mich App at 227:

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[2] The county's ordinance defines "shadow flicker" as "[a]lternating changes in light intensity caused by the moving blade of a WES [wind energy system] casting shadows on the ground and/or structures."

> "In general, an 'actual controversy' exists where a declaratory judgment or decree is necessary to guide a plaintiff's future conduct in order to preserve his legal rights." *Shavers v Attorney General*, 402 Mich 554, 588; 267 NW2d 72 (1978). It is not necessary that "actual injuries or losses have occurred"; rather "that plaintiffs plead and prove facts which indicate an adverse interest necessitating a sharpening of the issues raised." *Id*. at 589.

Here, plaintiff showed that it was subject to potential injury by defendants' ordinances and that a decision from the trial court was necessary to protect its legal rights. Plaintiff had received a special permit from the county, but could not proceed with its plans to operate its wind energy system until its rights relative to defendants' ordinances were adjudicated. Plaintiff sufficiently showed an actual controversy, and not merely a hypothetical injury, given that defendants were attempting to subject plaintiff to additional licensing requirements for a special land use for which the county had already issued a permit. Accordingly, the trial court did not err in ruling that plaintiff's claim was ripe for review under MCR 2.605. See also *UAW v Central Mich Univ Trustees*, 295 Mich App 486, 495; 815 NW2d 132 (2012).

III. PREEMPTION

This Court reviews a trial court's summary disposition decision de novo. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support for a claim. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995). A reviewing court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula*, 212 Mich App at 48.

We agree with the trial court that defendants' ordinances were in substance zoning regulations that conflicted with the county's ordinance and that because the county enacted its ordinance under the MZEA and defendants' ordinances were not enacted pursuant to that act, the county's ordinance was controlling.

Clinton County adopted its ordinance for zoning of wind energy systems under the MZEA, which became effective July 1, 2006, and replaced the former County Zoning Act, MCL 125.201 *et seq.*, and the former Township Zoning Act, MCL 125.271 *et seq.*, in order to promote consistency in zoning procedures. Under the MZEA, townships and counties are, for the most part, treated similarly. Cameron, *Mich Real Prop Law*, Supplement, p 332, § 23.5. Under the MZEA, a local unit of government, including a township, may adopt a

> zoning ordinance for the regulation of land development and the establishment of 1 or more districts within its zoning jurisdiction which regulate the use of land and structures to meet the needs of the state's citizens for food, fiber, energy, and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land, to ensure that use of the land is situated in appropriate locations and relationships, to limit the inappropriate overcrowding of land and congestion of population, transportation systems, and other public facilities, to

> facilitate adequate and efficient provision for transportation systems, sewage disposal, water, energy, education, recreation, and other public service and facility requirements, and to promote public health, safety, and welfare. [MCL 125.3201(1).]

The MZEA provides the sole authority for a local government to exercise zoning authority. *Maple BPA, Inc v Bloomfield Twp*, 302 Mich App 505, 515; 838 NW2d 915 (2013).

"State law preempts a municipal ordinance in two situations: (1) where the ordinance directly conflicts with a state statute or (2) where the statute completely occupies the field that the ordinance attempts to regulate." *Czymbor's Timber, Inc v City of Saginaw*, 269 Mich App 551, 555; 711 NW2d 442 (2006), aff'd 478 Mich 348 (2007).

MCL 125.3209 provides that "[e]xcept as otherwise provided under this act, a township that has enacted a zoning ordinance *under this act* is not subject to an ordinance, rule, or regulation adopted by a county under this act." (Emphasis added.) Pursuant to MCL 125.3210, however, where there are inconsistencies between an ordinance adopted under the MZEA and an ordinance adopted under another law, the ordinance adopted under the MZEA will generally control. Specifically, MCL 125.3210 provides that "[e]xcept as otherwise provided under this act, an ordinance adopted under this act shall be controlling in the case of any inconsistencies between the ordinance and an ordinance adopted under any other law."

Although this case involves a county ordinance, that ordinance was enacted pursuant to the MZEA. Thus, the issue of preemption depends on the Legislature's intent in adopting the MZEA. MCL 125.3210 reflects a codification of the doctrine of "field preemption." "Field preemption" is defined in *People v Llewellyn*, 401 Mich 314, 323-325; 257 NW2d 902 (1977), as follows:

> First, where the state law expressly provides that the state's authority to regulate in a specified area of the law is to be exclusive, there is no doubt that municipal regulation is preempted.
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> Second, preemption of a field of regulation may be implied upon an examination of legislative history.
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> Third, the pervasiveness of the state regulatory scheme may support a finding of preemption. While the pervasiveness of the state regulatory scheme is not generally sufficient by itself to infer pre-emption, it is a factor which should be considered as evidence of preemption.
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> Fourth, the nature of the regulated subject matter may demand exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest.
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> As to this last point, examination of relevant Michigan cases indicates that where the nature of the regulated subject matter calls for regulation adapted to local conditions, and the local regulation does not interfere with the state regulatory scheme, supplementary local regulation has generally been upheld.

> However, where the Court has found that the nature of the subject matter regulated called for a uniform state regulatory scheme, supplementary local regulation has been held preempted. [Citations omitted.]

It is undisputed that defendants did not adopt any of the wind energy ordinances under the MZEA. Accordingly, if the ordinances qualify as zoning ordinances, then MCL 125.3210 establishes that Clinton County's zoning ordinance will be deemed controlling to the extent of any inconsistencies between defendants' ordinances and the county's ordinance. That is, if defendants' ordinances are de facto zoning laws, then they are preempted.

Defendants argue that their ordinances were properly adopted under MCL 41.181, pursuant to their general police power to regulate the health, safety, and welfare of their residents within their respective boundaries. Townships have no inherent powers. They only possess those limited powers conferred on them by the Legislature or the state constitution. The township ordinance act, MCL 41.181, allows townships to enact ordinances that regulate the public health, safety, and general welfare. "While the provisions of the Constitution and law regarding counties, townships, cities, and villages must be liberally construed in their favor, the powers granted to townships by the Constitution and by law must include only those fairly implied and not prohibited by the Constitution. Const 1963, art 7, § 34." *Howell Twp v Rooto Corp,* 258 Mich App 470, 475-476; 670 NW2d 713 (2003).

"The township ordinance act, MCL 41.181, is the basic enabling act granting townships the power to enact ordinances that regulate the public health, safety, and general welfare." *Hess v Cannon Twp,* 265 Mich App 582, 590; 696 NW2d 742 (2005), quoting *Howell Twp,* 258 Mich App at 475. MCL 41.181(1) provides:

> The township board of a township, at a regular or special meeting by a majority of the members elect of the township board, may adopt ordinances regulating the public health, safety, and general welfare of persons and property, including, but not limited to, ordinances concerning fire protection, licensing or use of bicycles, traffic, parking of vehicles, sidewalk maintenance and repairs, the licensing of business establishments, the licensing and regulating of public amusements, and the regulation or prohibition of public nudity, and may provide sanctions for the violation of the ordinances. The township shall enforce the ordinances and may employ and establish a police department with full power to enforce township ordinances and state laws. If state laws are to be enforced, a township shall have a law enforcement unit or may by resolution appropriate funds and call upon the sheriff of the county in which the township is located, the department of state police, or another law enforcement agency to provide special police protection for the township. The sheriff, department of state police, or other local law enforcement agency shall, if called upon, provide special police protection for the township and enforce local township ordinances to the extent that township funds are appropriated for the enforcement. Special township deputies appointed by the sheriff shall be under the jurisdiction of and solely responsible to the sheriff. Ordinances regulating traffic and parking of vehicles and bicycles shall not contravene the Michigan vehicle code, 1949 PA 300, MCL 257.1 to 257.923.

Defendants' ordinances are accorded a presumption of validity. *Peninsula Sanitation, Inc v City of Manistique,* 208 Mich App 34, 38; 526 NW2d 607 (1994).

Whether defendants' ordinances are preempted by the MZEA, specifically MCL 125.3209 and MCL 125.3210, depends on whether those ordinances involve matters subject to zoning. Generally, a zoning ordinance is one that regulates the use of land and buildings according to districts, locations, or areas. *Square Lake Hills Condo Ass'n v Bloomfield Twp,* 437 Mich 310, 323; 471 NW2d 321 (1991). "The question whether or not a particular ordinance is a zoning ordinance may be determined by a consideration of the substance of its provisions and terms, and its relation to the general plan of zoning in the city." *Id*., following 8 McQuillin, *Municipal Corporations*, § 25.53, p 137. The distinction between a zoning ordinance and a regulatory ordinance cannot depend on whether the purpose is to promote the public good because both types of ordinances may have that purpose. *Natural Aggregates Corp v Brighton Twp,* 213 Mich App 287, 298-299; 539 NW2d 761 (1995).

Defendants argue that their ordinances are valid because they address "activities" (related to producing wind energy) within their respective borders. It is clear, however, that the ordinances regulate the "use" of land in defendants' townships and the construction of structures. The construction of an infrastructure of wind turbines as part of a wind energy system is not merely an activity on land, but rather relates to a permanent land use.[3] MCL 125.3201 also supports the trial court's determination that defendants' ordinances should be treated as zoning regulations. That statute expands the matters that the Legislature intended to fall within the scope of the MZEA.[4] By MCL 125.3201, "[t]he Legislature has empowered local governments

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[3] A regulatory ordinance, in contrast to a zoning ordinance, does not allow for an exception for a nonconforming use. *Casco Twp v E Brame Trucking Co, Inc*, 34 Mich App 466, 471; 191 NW2d 506 (1971). It is telling that defendants' ordinances expressly permit variances from the licensing requirements. This feature is consistent with a zoning law, not a regulatory ordinance.

[4] MCL 125.3201 provides, in relevant part:

> (1) A local unit of government may provide by zoning ordinance for the regulation of land development and the establishment of 1 or more districts within its zoning jurisdiction which regulate the use of land and structures to meet the needs of the state's citizens for food, fiber, energy, and other natural resources, places of residence, recreation, industry, trade, service, and other uses of land, to ensure that use of the land is situated in appropriate locations and relationships, to limit the inappropriate overcrowding of land and congestion of population, transportation systems, and other public facilities, to facilitate adequate and efficient provision for transportation systems, sewage disposal, water, energy, education, recreation, and other public service and facility requirements, and to promote public health, safety, and welfare.
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> * * *

to zone for the broad purposes identified" in that statute. *Kyser v Kasson Twp*, 486 Mich 514, 520; 786 NW2d 543 (2010). The MZEA provides that zoning regulations may even extend beyond land use to certain types of activities. In addition, it is apparent that defendants' ordinances are essentially mirrors of the county's ordinance, with more stringent requirements. Defendants contend that their ordinances do not involve land use because they are not limited to specific districts or zones. It is clear, however, that the regulations were intended to operate within the county's zoning ordinance, which limits wind energy systems to agricultural zones or districts, and then impose additional requirements with regard to the county's zones or districts. Although defendants did not establish districts or zones for wind energy systems, they adopted their own requirements on how land in those areas, as defined by the county, could be used for wind energy production. While MCL 41.181 clearly permits defendants to adopt laws for the protection of the public health, safety, and welfare of their citizens, a zoning regulation must be enacted pursuant to the MZEA. Because defendants' ordinances regulate the "use" of land, not just isolated "activities," the ordinances are not proper regulatory laws enacted pursuant to defendants' general police powers, but rather properly are classified as zoning laws. See *Natural Aggregates*, 213 Mich App at 300-301, following *Square Lake Condo*, 437 Mich at 323 (Riley, J.).

Although defendants argue that Clinton County's ordinance recognizes that townships can adopt stricter standards, that provision must be read consistent with the MZEA, which expressly provides that an ordinance enacted under that act is controlling in the event of any inconsistencies with an ordinance enacted under any other law. MCL 125.3210. Therefore, for a township to validly adopt stricter standards related to zoning of wind energy systems, it must do so in accordance with the procedures prescribed in the MZEA. Because defendants' ordinances were not enacted under the MZEA, whereas the county's ordinance was enacted pursuant to that act, defendants' ordinances must yield to the county's ordinance.

Defendants rely on the Court's opinion in *Frens Orchards, Inc v Dayton Twp*, 253 Mich App 129; 654 NW2d 346 (2002), as an example of how the Court resolved a claimed conflict between a local ordinance and a statute where the statute provided that deference to an applicable local rule, ordinance or code was allowed when the local rule, ordinance or code contained a more stringent requirement. The Court however did not harmonize the ordinance and statute in *Frenz* to rectify a conflict. Instead, the Court held that no issue of pre-emption existed where the township ordinance pertained to the location of migrant camps, i.e. the use of land, 253 Mich

> (3) A local unit of government may provide under the zoning ordinance for the regulation of land development and the establishment of districts which apply only to land areas and activities involved in a special program to achieve specific land management objectives and avert or solve specific land use problems, including the regulation of land development and the establishment of districts in areas subject to damage from flooding or beach erosion.
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> (4) A local unit of government may adopt land development regulations under the zoning ordinance designating or limiting the location, height, bulk, number of stories, uses, and size of dwellings, buildings, and structures that may be erected or altered, including tents and recreational vehicles.

App at 135, and the statute pertained to the health and safety of migrant workers at the camps, *Id*. at 134. In the present case, both ordinances attempt to regulate uses of land. Also noteworthy is that *Frens* was decided before the enactment of the MZEA which now expressly provides for how to resolve inconsistencies between ordinances enacted under the MZEA and those enacted under other laws in an effort to promote uniformity in zoning procedures.

By way of supplemental authority, defendants also direct our attention to our Supreme Court's opinion in *IBM v Dept of Treasury*, 496 Mich 642; 852 NW2d 865 (2014), and argue that *IBM* requires us to "make every attempt" to harmonize conflicting provisions between the county and township ordinances. The issues in *IBM* were: 1) whether petitioner could elect to use the apportionment formula under the Multistate Tax Compact when it facially appeared to conflict with the apportionment formula under the Michigan Business Tax Act; and 2) whether the Michigan Business Tax Act repealed the Multistate Tax Compact by implication. *IBM*, 496 Mich at 644-645. In applying *IBM*, defendants here contend that the ordinances can be easily harmonized where the county ordinance contains provisions that allow deference to "stricter" or more "stringent" ordinances; thus, allowing the township ordinances, because they are more strict, to apply instead. *IBM* however, is distinguishable from the instant case. In *IBM* there were only the two different tax statutes to analyze and our Supreme Court's review focused on determining the intent of the Legislature to reconcile the apparent statutory conflict and avoid repeal by implication. Here, we have the two different ordinances *and* the MZEA which guides the resolution of conflict between the two ordinances, where in this case one is enacted under the MZEA and the other under a different law. The intent of the Legislature is clearly expressed in the MZEA and it is not to harmonize the ordinances, but rather to find that the ordinance enacted under the MZEA is controlling in the event of any conflict with an ordinance enacted under another law. MCL 125.3210.

We also reject defendants' argument that Clinton County, by enacting its own wind energy ordinance, has improperly interfered with defendants' local affairs. Defendants rely on MCL 46.11(j), which provides, in relevant part:

> A county board of commissioners, at a lawfully held meeting, may do 1 or more of the following:
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> * * *
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> (j) By majority vote of the members of the county board of commissioners elected and serving, pass ordinances that relate to county affairs and do not contravene the general laws of this state or interfere with the local affairs of a township, city, or village within the limits of the county, and pursuant to section 10b [MCL 46.10b] provide suitable sanctions for the violation of those ordinances. . . .

The "act" by Clinton County on which defendants rely is the county's passage of its own zoning ordinance. Under the MZEA, however, the county's zoning ordinance became applicable to defendants because they did not enact a zoning law addressing wind energy systems. Nothing by the county prevented defendants from enacting their own *zoning* ordinances or proper regulations under defendants' police powers. Defendants have not shown that the county

performed any act that improperly interfered with defendants' rights to control their own local affairs. The county's ordinance became controlling with respect to wind energy systems only because defendants failed to properly act.

The trial court correctly held that plaintiff was entitled to judgment in its favor because there is no genuine issue of material fact that defendants' ordinances substantively qualify as zoning regulations and regulate the same subject matter as Clinton County's zoning ordinance. Because Clinton County adopted its ordinance under the MZEA and defendants did not adopt their ordinances under that act, Clinton County's ordinance is controlling and establishes the only standards for regulating the use of property for wind energy systems.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens